United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7404

United States Court of Appeals

FOR THE SECOND CIRCUIT

ARNOLD MARSHEL,

Plaintiff-Appellant,

v.

AFW FABRIC CORP., CONCORD FABRICS INC., ALVIN WEINSTEIN and FRANK WEINSTEIN,

Defendants-Appellees.

BARRY L. SWIFT

Plaintiff-Appellant,

v.

CONCORD FABRICS INC., AFW FABRICS CORP., ALVIN WEINSTEIN and FRANK WEINSTEIN,

Defendants-Appellees.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF DEFENDANTS-APPELLEES AFW FABRIC CORP., ALVIN WEINSTEIN and FRANK WEINSTEIN

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BRIEF OF DEFENDANTS-APPELLEES
AFW FABRIC CORP., ALVIN WEINSTEIN and FRANK WEINSTEIN

Issue Presented for Review

Whether or not Plaintiffs' appeal from the order of the United States District Court for the Southern District of

New York, which denied Plaintiffs' motions for a preliminary injunction against a merger of CONCORD FABRICS INC. ("Concord") and AFW FABRIC CORP. ("AFW"), was moot at the time this Court rendered its judgment and decision reversing the District Court's order or, in the alternative, subsequently became moot, thereby mandating a dismissal of the instant appeal, where the undisputed and documentary evidence establishes that:

(a) The proposed merger of AFW into Concord was terminated prior to the entry of the judgment and decision of this Court which was, apparently, rendered without knowledge that the proposed merger was terminated;

(b) This Court denied Defendants' application for rehearing at the same time as the denial of rehearing in Green v. Santa Fe Industries, Inc.* although (i) Defendants' time to file its petition for rehearing had not yet expired and (ii) without, therefore, considering whether the Plaintiffs' appeal was moot;

(c) Defendants have consented to the entry of a permanent injunction enjoining them from directly or indirectly effectuating the proposed merger, which consent judgment has been filed in the Office of the Clerk of the Supreme Court of the State of New York, County of New York;

(d) Plaintiffs have admitted and acknowledged in their brief in opposition to Defendants' petition for a writ of

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* [illegible]3 F.2d 1309 (2d Cir. 1976).

certiorari that their application for a preliminary injunction has become moot; and

(e) Defendants requested the Supreme Court of the United States to vacate the judgment of this Court in the event it accepted Plaintiffs' contention that the issues raised were moot, and the Supreme Court of the United States vacated this Court's judgment?

Preliminary Statement

This brief is submitted on behalf of all Defendants, except Defendant Concord*, in accordance with this Court's direction that the parties submit any points they wish the Court to consider on the question of mootness.

On October 12, 1976, the Supreme Court of the United States entered the following order in this case:

> "The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit to consider whether or not the case is moot."

By order entered on November 12, 1976, this Court, in obedience to the mandate of the Supreme Court, vacated its judgment which had been entered on February 13, 1976. The February 13th judgment

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* For convenience, all Defendants-Appellees on this appeal are referred to in this brief as "Defendants" and Plaintiffs-Appellants as "Plaintiffs" unless indicated to the contrary.

of this Court had, in turn, reversed an order of the United States District Court for the Southern District of New York (MacMahon, J.) dated June 24, 1975, which denied Plaintiffs' motions for a preliminary injunction against a proposed merger of AFW into Concord.

The only "case" that was ever before this Court was whether or not Plaintiffs' motions for a preliminary injunction were properly denied by the District Court. Putting it another way, the case in this Court merely involved the question of whether or not a preliminary injunction should issue.

If the need for a preliminary injunction was obviated prior to the time that this Court rendered a decision, there was no longer a case or controversy for this Court to adjudicate. On the undisputed facts, it is clear that by the time this Court rendered its decision, the proposed merger had been terminated and there was, therefore, nothing to enjoin. Accordingly, it can be said that prior to the time this Court made its decision, there was no longer any "case" before the Court. Therefore, this Court, having already vacated its judgment, should dismiss the Plaintiffs' appeal and remand the case to the District Court for further proceedings to determine whether Plaintiffs are entitled to any other relief now that their motions for injunctive relief have been found unnecessary. That is, this Court, having already properly vacated its own judgment, should remand the case to the

District Court with the direction to proceed with the action in the ordinary course.

In connection with all of the foregoing, it must be observed that even if the case had not become moot before the judgment and decision of this Court on February 13, 1976, it is abundantly clear, as even admitted by Plaintiffs, that it is now moot since the plan of merger has been terminated and since there is even a judgment of a Court of competent jurisdiction terminating the merger.* Thus, at this date, there is certainly no case or controversy for this Court to adjudicate. This Court, therefore, has no jurisdiction to enter any order on the merits and would be limited, under prevailing authority, to a remand to the District Court for further proceedings.

Statement of the Facts

The facts relevant to a determination of the mootness issue may be summarized as follows:

(a) On February 10, 1976, the proposed merger between Concord and AFW (which was the subject of the motions for a preliminary injunction and the only matter before this Court)

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* On March 10, 1976, a final judgment was entered with the consent of Defendants in the New York County Clerk's Office enjoining the proposed merger (see page 7, infra.).

was terminated (2a).* The merger was terminated because it was believed that long-term planning and financing would be more difficult as a result of the uncertainty which existed as to whether Concord would remain public or be a privately-held company;

(b) By letters dated February 12, 1976, the then attorneys for all Defendants (and the present attorneys for Concord) advised the Court that the proposed merger, which was the subject matter of the appeal pending before this Court, had been terminated. A dismissal of Plaintiffs' appeal was requested on the basis that said appeal was moot (10a-13a);

(c) On February 13, 1976, this Court handed down its decision and judgment reversing the District Court (which had denied the motions for a preliminary injunction);

(d) By notice of motion dated February 18, 1976, Defendants sought an extension of their time to file a petition for rehearing, which motion was granted by order dated February 25, 1976, extending Defendants' time to and including March 12, 1976;

(e) By order dated March 10, 1976, this Court denied sua sponte a rehearing en banc despite the fact that Defendants' time to file their petition for rehearing was not to expire until

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* Numerical references in parentheses followed by the letter "a" are to pages of the Appendices to this brief.

two days later. This order was granted at the same time as the order in Green v. Santa Fe Industries, Inc. so that both cases could ". . .as an exercise of sound, prudent and resourceful judicial administration" be speeded on their way to the Supreme Court.*

On March 10, 1976, a final judgment was entered with the consent of Defendants in the New York County Clerk's Office (14a). The judgment provides, in relevant part, as follows:

> "ORDERED, ADJUDGED AND DECREED that the defendants be permanently enjoined, barred and restrained from directly or indirectly effectuating the proposed merger of Concord and AFW, the terms of which merger are set forth in a Notice of Special Meeting of Shareholders of Concord dated March 17, 1975 and the accompanying Proxy Statement, and from any act in aid or furtherance of the merger; and it is further
>
> "ORDERED, ADJUDGED AND DECREED that the defendants be permanently enjoined, barred and restrained from directly or indirectly engaging in any fraudulent practice as defined in section 352(1) of the General Business Law of this State, in connection with any tender, offer or merger or other transaction for the purpose of returning Concord to the private ownership of the individual defendants Alvin and Frank Weinstein or members of their families. . ."

Defendants' consent to the entry of said judgment is entirely consistent with the termination of the proposed merger one month earlier and further evidence of their intent not to consummate same.

After this Court, sua sponte, denied Defendants a

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* 533 F.2d 1309 (2d Cir. 1976).

rehearing en banc, Defendants petitioned the Supreme Court of the United States for a writ of certiorari.

Plaintiff, Arnold Marshel ("Marshel"), in his brief in opposition to Defendants' petition, admitted and acknowledged that Defendants' consent to a permanent injunction against the proposed merger rendered moot the issues pending before the Court. In this connection, Marshel's brief stated, among other things:

> "Since the merger can no longer take place because of the permanent injunction issued by the state court, there is no justifiable [sic] controversy to place before this Court. . ."
>
> * * *
>
> "It is accordingly submitted that petitioners' [Defendants'] inability to resurrect the merger because of the permanent injunction has mooted the issues which they are asking this Court to review."

In their Reply Brief in support of the petition for a writ of certiorari, Defendants urged that if the Supreme Court accepted Marshel's contention (i.e., that the issues raised by the petition were moot), the Supreme Court "should vacate the judgment of the Court of Appeals." Obviously, if the Supreme Court did not vacate this Court's judgment, the Plaintiffs would be in a position to rely upon this Court's judgment in support of their claim for damages although Defendants had been denied review by the Supreme Court based upon Marshel's allegation of mootness.

In view of the foregoing, the Supreme Court, having granted certiorari and having vacated the judgment of this Court, must have done so on the basis that Plaintiffs' motions for injunctive relief were moot.

ARGUMENT

PLAINTIFFS' MOTIONS FOR INJUNCTIVE RELIEF ARE MOOT AND PLAINTIFFS' APPEAL SHOULD THEREFORE BE DISMISSED BECAUSE THERE IS PRESENTLY NO CASE OR CONTROVERSY TO ADJUDICATE.

The question of mootness is a Federal question which must be resolved by a Federal court before it assumes jurisdiction.

DeFunis v. Odegaard, 416 U.S. 312 (1974);

North Carolina v. Rice, 404 U.S. 244 (1971);

It is well-settled that an actual controversy must exist at all stages of appellate or certiorari review and not simply at the date the action is initiated.

Preiser v. Newkirk, 422 U.S. 395 (1975);

Steffel v. Thompson, 415 U.S. 452 (1974);

Roe v. Wade, 410 U.S. 113 (1973);

SEC v. Medical Committee for Human Rights, 404 U.S. 403 (1972);

United States v. Munsingwear, Inc., 340 U.S. 36 (1950).

Indeed, the Supreme Court has expressly stated that when a case is remanded by the Supreme Court to a lower court, the proper inquiry is whether a "controversy" exists at the time

of the hearing by the lower court on the remand.

Golden v. Zwickler, 394 U.S. 103 (1969).

The established practice for a Federal appeals court to follow when dealing with a civil case which has become moot is to reverse or vacate the judgment below and remand with a direction to dismiss.

United States v. Munsingwear, Inc., 340 U.S. 36 (1950);

Duke Power Co. v. Greenwood County, 299 U.S. 259 (1936).

In Munsingwear, the Supreme Court stated that the aforementioned established practice is applicable either when a civil case:

". . .has become moot while on its way here or pending our decision on the merits. . ." 340 U.S. at 39.

The issue presented to this Court on the appeal from the District Court was whether or not injunctive relief should be granted. If, prior to the judgment and decision on the appeal, the need for injunctive relief ceased, the case became moot. Putting it another way, if there was no reasonable expectation that the activity sought to be enjoined would be continued or repeated, the case became moot.

Preiser v. Newkirk, 422 U.S. 395 (1975);

United States v. W. T. Grant Co., 345 U.S. 629 (1953);

Atherton Mills v. Johnston, 259 U.S. 13 (1922);

United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft, 239 U.S. 466 (1916);

Robert Stigwood Group Ltd. v. Hurwitz,
462 F.2d 910 (2d Cir. 1972).

A. This Case Was Moot Before This Court's Judgment and Decision.

This Court's judgment and decision were rendered on February 13, 1976. Before that date, the proposed merger had been terminated. The Defendants sought to advise the Court of this fact by letters dated February 12, 1976. Accordingly, under the standards laid down by the cited cases, the case became moot prior to the time this Court rendered its decision and, presumably, if the Court had known of that fact, it would have vacated the District Court's judgment and dismissed the appeal.

Consequently, even without regard to the determination by the Supreme Court, it would have been entirely appropriate for this Court, if it had not already done so, to vacate its judgment and then proceed to vacate the District Court's judgment, and dismiss the appeal.

B. Even If The Case Were Not Moot Before This Court's Judgment and Decision, It Is Moot Now, Thus Mandating The Same Result.

At the same time that this Court was considering this case, it was also considering Green v. Santa Fe Industries, Inc.* The Green case, while, of course, presenting somewhat different facts, involved, as far as the Court was concerned, similar issues. This Court's decision in the Green case ran parallel with its decision in this case. This Court, presumably still

* 533 F.2d 1283 (2d Cir. 1976), cert. granted, 97 S.Ct. 54 (1976).

unaware that this case had become mooted, and acting sua sponte, on March 10, 1976 denied rehearing en banc to facilitate prompt application for review to the Supreme Court.*

In connection with the petition before the Supreme Court, counsel for Marshel admitted and acknowledged that the case had become moot. Then counsel for Defendants urged that if the Supreme Court accepted Marshel's contention, the Supreme Court "should vacate the judgment of the Court of Appeals." In granting certiorari and remanding the case to this Court, the Supreme Court vacated this Court's judgment with a direction that this Court consider "whether or not the case is moot." (Emphasis supplied.)

In vacating this Court's judgment, the Supreme Court necessarily determined that the motions for injunctive relief (the only "case" before this Court) were moot. The further direction to this Court to consider whether or not the "case" is moot obviously was a direction to this Court to determine whether or not the "case" in the District Court (involving Plaintiffs' other and additional requests for relief) was rendered moot.**

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* The action of this Court presumably convinced Defendants' then counsel that any further application to this Court would not be entertained.

** The issue before this Court related only to the propriety of denying preliminary injunctive relief. Accordingly, this Court is not now in a position to determine whether the Plaintiffs' other requests for relief are within the jurisdiction of the District Court. That is a matter for the District Court to determine on proceedings after remand to that Court.

C. This Court Has No Jurisdiction To Make Any Judgment Affecting the Merits.

We understand that counsel for Plaintiffs intends to ask this Court to reinstate its prior judgment. We respectfully submit that in making this suggestion, counsel for Plaintiffs are asking this Court to overrule the Supreme Court and ignore the Constitution. When the Supreme Court vacated this Court's judgment, it did so either because it considered this Court's judgment erroneous on the merits or because it otherwise thought that the judgment of this Court should not continue in effect. Assuming that the Supreme Court did not intend to overrule this Court on the merits, it is obvious that it made a determination that the case (i.e. Plaintiffs' motions for injunctive relief) was moot. In reaching this determination, the Supreme Court may or may not have considered the fact that subsequent to the termination of the merger on February 10, 1976, the Defendants had also entered into a consent judgment (dated March 9, 1976) in the Supreme Court of the State of New York. However, in either event, it is clear that the Supreme Court made a determination on the mootness question and such determination is certainly not subject to review by this Court.

Assuming, although it is unlikely, that the Supreme Court's decision was predicated on the consent judgment in the New York State Supreme Court dated March 9th (which was entered

in the Clerk's Office on March 10th) and not the February 10th termination of the merger, the fact remains that this Court's judgment was vacated and the "case" (the question of injunctive relief) is now moot. Under the cases cited at pages 9-10, supra, this Court cannot now make a judgment dealing with preliminary injunctive relief. Therefore, the request that the original judgment be reinstated is a request with which this Court cannot comply because of the ruling of the Supreme Court, as well as the constitutional prohibition depriving all Federal courts of jurisdiction in the absence of a case or controversy.

Of course, it is abundantly clear that the Plaintiffs are not so much interested in having this Court enter judgment as they are in being able to argue that the decision of this Court is dispositive of other similar issues that are relevant in proceedings before the District Court. The Plaintiffs, having successfully prevented an adjudication on the merits in the Supreme Court, cannot now seek to have this Court's judgment reinstated so that they can attempt to place reliance upon it in any further proceedings. We cannot close our eyes to the fact that the published decision of this Court may have some effect on the views of the District Court Judges serving in the Second Circuit, but no Federal court can render advisory opinions, and that, in effect, is what the Plaintiffs are trying to obtain.

In this connection, we point out that the Defendants do not take the position that this Court should allow the District Court's judgment (which was in favor of the Defendants) to stand merely because the case was mooted before this Court

made its decision. We understand the rule to be that when a case becomes moot while on appeal, lower court decisions must also give way. In this connection, we respectfully refer this Court to the following relevant language from the Supreme Court's decision in United States v. Munsingwear, Inc.:

> "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand, with a direction to dismiss. That was said in Duke Power Co. v. Greenwood County, 299 U.S. 259, 267, 57 S.Ct. 202, 205, 81 L.Ed. 178, to be 'the duty of the appellate court'. That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." 340 U.S. at 39-40.

CONCLUSION

The "case" was moot at the time that this Court rendered its original decision and judgment. This Court should therefore have vacated the judgment of the District Court and dismissed the appeal. In any event, in view of the decision of the Supreme Court, which vacated this Court's judgment, and since the "case" before this Court is now certainly moot (as conceded by the Plaintiffs), the appropriate procedure is the

same. . .the case should be r[illegible]nded to the District Court and the District Court judgment denying preliminary injunctive relief vacated.

Respectfully submitted,

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APPENDICES

APPENDIX A

Notice of Annual Meeting of Stockholders
and Proxy Statement

CONCORD FABRICS INC.

NOTICE OF ANNUAL MEETING OF STOCKHOLDERS

May 13, 1976

To Our Stockholders:

You are cordially invited to attend the Annual Meeting of Stockholders to be held on May 13, 1976, at 10:00 A.M., at Irving Trust Company, 1290 Avenue of the Americas, New York, New York, for the following purposes:

(1) To elect eight directors to serve until the next Annual Meeting and until their successors are elected.

(2) To approve a stock award of 50,000 shares of the Company's Common Stock and a related cash bonus granted as an incentive to David R. Caplan, President of the Company.

(3) To vote on the ratification of the selection by the Board of Directors of Eisner & Lubin as independent certified public accountants of the Company for the fiscal year ending August 29, 1976.

(4) To transact such other business as may properly come before the meeting or any adjournment thereof.

Only stockholders of record at the close of business on April 12, 1976 are entitled to receive notice of and to vote at the meeting.

Please sign, date and mail the enclosed proxy in the enclosed envelope, which requires no postage if mailed in the United States, so that your shares of stock may be represented at the meeting.

By order of the Board of Directors,

MARTIN WOLFSON
Secretary

April 19, 1976

CONCORD FABRICS INC.

1411 Broadway
New York, New York 10018

Proxy Statement

The Annual Meeting of Stockholders will be held on May 13, 1976, for the purposes set forth in the foregoing notice. The accompanying form of proxy for use at the meeting and at any adjournments thereof is solicited by management and may be revoked at any time prior to its exercise by written notice to the Secretary of the Company. Proxies in the accompanying form which are properly executed by stockholders and duly returned to management and not revoked will be voted (a) with respect to directors in the manner indicated under "Nominees For Election As Directors" below (unless authority to vote for the election of directors is withheld), (b) with respect to the approval of the stock award and related cash bonus granted to David R. Caplan in the manner specified in the proxy, and (c) with respect to the ratification of the selection of Eisner & Lubin as the Company's independent certified public accountants in the manner specified in the proxy; if no specification is made the proxies will be voted in favor of approval of the stock award and related cash bonus granted to Mr. Caplan and ratification of the selection of auditors, as the case may be. This proxy statement and the accompanying form of proxy are being mailed to stockholders on or about April 19, 1976.

As of the close of business on April 12, 1976, the record date for the meeting, the Company had outstanding and entitled to vote at the meeting 1,795,731 shares of Common Stock, each share being entitled to one vote. On that date, AFW Fabric Corp. was the record owner of 1,226,549 shares of Common Stock, representing approximately 68% of the outstanding Common Stock. Alvin Weinstein, Chairman of the Board of the Company, and Frank Weinstein, Chairman of the Executive Committee of the Company, as the principal shareholders of AFW Fabric Corp., may each be considered the indirect beneficial owner of the 1,226,549 shares held by AFW Fabric Corp.

TERMINATED MERGER WITH AFW FABRIC CORP.

On February 10, 1976 the Company and AFW Fabric Corp. ("AFW") terminated the proposed merger of AFW into the Company, which had been designed to return the Company to the status of a privately-held corporation.

In February 1975, Messrs. Alvin and Frank Weinstein and certain trusts for members of their families exchanged their shares of the Company's Common Stock (which constituted approximately 68% of the Company's outstanding Common Stock) for all of the outstanding capital stock of AFW. A Plan of Merger was then proposed, under which the Company would be returned to the status of a privately-held corporation owned by the Weinstein family. This was to be accomplished by a merger of AFW into the Company on terms under which all of the Company's stockholders, other than AFW, would receive $3 per share in cash, and the Weinstein family, as the owners of AFW, would receive shares of the Company's Common Stock. The proposal was described in the Company's Proxy Statement dated March 17, 1975, and was approved by the requisite two-thirds vote at a special meeting of stockholders held on April 10, 1975; this approval was assured, in view of the ownership of 68% of the Company's stock by AFW.

In April 1975, the Attorney General of the State of New York commenced an action against the Company, Alvin Weinstein, Frank Weinstein, and David Caplan, President of the Company, seeking to enjoin the merger. The complaint alleges in substance that the proposed merger was "inherently fraudulent" in violation of the anti-fraud provisions of the New York General Business Law, and that the defendants committed unspecified fraudulent acts in connection with an offer to purchase securities of the Company. On June 27, 1975 the New York State Supreme Court issued a preliminary injunction restraining the consummation of the merger, and on December 23, 1975 the Appellate Division of the Supreme Court affirmed (without an opinion) the lower Court's order by a vote of 4-1. The Company sought permission to appeal the Appellate Division's decision to the New York State Court of Appeals, which was granted on February 10, 1976. Following a meeting of its Board of Directors late that day, however, the Company announced that the proposed merger had been terminated by mutual consent. The Company stated that although it believed its legal position was correct and would ultimately be sustained, it appeared that argument of the appeal would not take place before the Fall and that a decision might not be reached before year-end. The Company further stated that it believed long-term planning and financing would be more difficult during this additional long period of uncertainty as to whether the Company would remain public or go private and, if the merger were consummated, during a further period of uncertainty concerning the ultimate cost to the Company of acquiring the publicly-held shares. The Company simultaneously announced a plan to acquire and equip a plant for dyeing and finishing a portion of its woven fabric requirements, contingent on obtaining financing therefor, and that it had reached an agreement in principle with an institutional lender for a term loan for the purpose.

On March 10, 1976, a final judgment was entered with the consent of the parties in the action brought by the Attorney General. The judgment, in which the Company and the other defendants deny the allegations of the complaint, enjoins the proposed merger and prohibits any violation of the anti-fraud provisions of the New York General Business Law in connection with a tender offer or merger for the purpose of going private; AFW, Alvin Weinstein and Frank Weinstein were each assessed $2,000, David R. Caplan was assessed $500 and the Company was assessed $375 of the Attorney General's costs.

In February and March 1975, four separate actions were commenced against the Company, Alvin Weinstein, Frank Weinstein and others in the United States District Court for the Southern District of New York, seeking to enjoin consummation of the merger. Three of the four complaints allege in substance that the proposed merger violates the anti-fraud provisions of the federal securities law and also violates New York law; the fourth alleges only that the proposed merger violates New York law. All four seek a permanent injunction against the merger and recovery of unspecified damages allegedly suffered by the Company and by the Company's stockholders as a class. The court consolidated the four actions and in June 1975 denied motions for a preliminary injunction against consummation of the merger; the appeal by plaintiffs in two of the four consolidated actions of that order was heard in September 1975. On February 13, 1976, three days after the Company had terminated the merger as described above, the United States Court of Appeals for the Second Circuit in *Marshel* v. *AFW Fabric Corp., Concord Fabrics Inc., Alvin Weinstein and Frank Weinstein* and *Swift* v. *Concord Fabrics Inc., AFW Fabric Corp., Alvin Weinstein and Frank Weinstein* reversed the District Court's decision and held that a preliminary injunction against the merger should have been granted; on March 11, 1976 the petition of the Company and the other defendants for a rehearing before the entire Court of Appeals was denied. The Company and the other defendants intend to file a petition for certiorari seeking review of the Court of Appeals' decision by the United States Supreme Court; all further proceedings in the four actions have been stayed pending a decision by the United States Supreme Court on the petition for certiorari.

In March 1975, an action *(Michaels* v. *AFW Fabric Corp., Alvin Weinstein, Frank Weinstein, David R. Caplan, Charles M. Edwards, Jr., George Gleitman, Ben Heller, Earl Kramer, Martin Wolfson, Concord Fabrics Inc. and Shearson Hayden Stone Inc.)* was commenced in New York State Supreme Court. The complaint seeks an injunction against the proposed merger on the ground that the proposed merger violates New York State law and that if New York law allows the merger, such law is in violation of the United States Constitution; it also seeks recovery of unspecified damages allegedly suffered by the Company and the Company's stockholders as a class. The defendants' time to answer the complaint has been extended to May 15, 1976.

NOMINEES FOR ELECTION AS DIRECTORS

Eight directors are to be elected to serve until the next Annual Meeting of Stockholders and until their respective successors are elected. Proxies in the accompanying form will be voted for the election as directors of the persons whose names are listed in the table below. If any of these nominees should not be candidates for director at the annual meeting, the proxies will be voted in favor of the remainder of those named, and may be voted for substitute nominees in the place of those who are not candidates. Management has no reason to expect that any of these nominees will fail to be candidates at the meeting, and therefore does not at this time have in mind any substitute for any nominee. The information below concerning the occupations and beneficial ownership of stock has been furnished to the Company by the individuals named.

Name of Nominee	Principal Occupation	First Elected a Director	Shares of Common Stock Owned Beneficially as of April 12, 1976
Alvin Weinstein	Chairman of the Board of the Company	1958	1,226,549(1)
Frank Weinstein	Chairman of the Executive Committee of the Company	1958	1,226,549(1)
David R. Caplan	President of the Company	1971	25,000
Dr. Charles M. Edwards, Jr. .	Dean Emeritus of the Institute of Retail Management, New York University	1969	0
George Gleitman	Vice President of the Company and President of its Retail Division	1970	1,375
Ben Heller	President, Ben Heller, Inc. (private art dealer)	1975	0
Earl Kramer	Vice President of the Company and President of its Knit Division	1974	10,100
Martin Wolfson	Secretary and Treasurer of the Company	1973	0

(1) AFW Fabric Corp. is the record owner of 1,226,549 shares of Common Stock. Alvin Weinstein and Frank Weinstein, as the principal stockholders of AFW Fabric Corp., may each be considered the indirect beneficial owner of the 1,226,549 shares held by AFW Fabric Corp.

(2) On April 15, 1976 a shareholder commenced an action (*Fabrikant* v. *Concord Fabrics, Inc. et al.*) in New York State Supreme Court against the Company and its directors seeking to compel the Company to declare cash dividends. The Company believes the suit is without merit.

REMUNERATION OF DIRECTORS AND OFFICERS

The following table sets forth the direct remuneration paid by the Company (including the bonuses paid under the employment agreements described below) during the fiscal year ended August 31, 1975, for services in all capacities to, and the amount set aside during fiscal 1975 and the amount accrued to August 31, 1975 under the Company's Profit Sharing Trust for, each director and each of the three highest paid officers of the Company whose aggregate remuneration exceeded $40,000, and all directors and officers as a group:

Name of Individual or Identity of Group	Capacities in Which Remuneration was Received	Aggregate Direct Remuneration	Amount Set Aside During Fiscal 1975	Amount Accrued to August 31, 1975
Alvin Weinstein ..	Chairman of the Board and Director	$163,204(1)	$ 9,719	$ 44,837
Frank Weinstein .	Chairman of the Executive Committee and Director	161,600(2)	9,719	44,837
David R. Caplan .	President and Director	185,300(3)	12,166	16,830
Earl Kramer	President of Knit Division and Director	131,951(4)	8,225	13,640
George Gleitman .	Vice President, President of Retail Division and Director	107,216(5)	6,881	27,701
Martin Wolfson .	Secretary, Treasurer and Director	55,000	3,046	8,359
All directors and officers as a group (11 persons)		946,591	58,079	166,556

(1) Includes a $50,000 bonus and a $14,204 non-accountable expense allowance. Alvin Weinstein will receive a salary of $150,000 and a $20,000 non-accountable expense allowance for fiscal 1976.

(2) Includes a $50,000 bonus and a $12,600 non-accountable expense allowance. Frank Weinstein will receive a salary of $150,000 and a $20,000 non-accountable expense allowance for fiscal 1976.

(3) The Company and David R. Caplan have amended his employment agreement dated March 10, 1975 to increase his salary from $110,000 to $125,000 per year (commencing as of September 1, 1975), and to extend the term of the agreement to August 31, 1980. The agreement also provides for a bonus equal to 1% of the Company's earnings before income taxes in each fiscal year. If he becomes permanently disabled during the term and the Company elects to terminate his employment, Mr. Caplan will receive his basic salary for a period of nine months after the date of termination. If he dies during his employment, his estate will receive an amount equal to his base salary for a period of twelve months. The Company has also agreed, subject to shareholder approval, to grant to Mr. Caplan a stock award and related cash bonus; see "Restricted Stock Award and Related Cash Bonus Granted to David R. Caplan" below.

(4) The Company entered into an employment agreement on May 1, 1975 with Earl Kramer for a term expiring on May 31, 1980 at an annual salary of $95,000 plus a bonus for each fiscal year equal to 2% of the Company's pre-tax profits attributable to the Knit Division (as defined) for the fiscal year. In March 1976, Mr. Kramer's employment agreement was amended to extend the term of the agreement to May 31, 1985 and to give Mr. Kramer executive responsibility for

the planned operation of a dyeing and finishing plant. In addition to the salary and bonus described above, Mr. Kramer will also receive (i) a bonus for each fiscal year 1976 through 1985 ranging from ¼¢ to ⅛¢ for each yard of fabric finished and dyed by the plant in the fiscal year and (ii) a bonus for each fiscal year 1979 through 1985 equal to 1% of the pre-tax profits of the plant (as determined by the Company) for the fiscal year. Mr. Kramer will also receive a $120,000 cash bonus payable on September 3, 1978 and an $80,000 cash bonus payable on May 31, 1980; these bonuses are payable only if Mr. Kramer is employed by the Company on the respective dates (or if his employment was terminated before those dates by his permanent disability or death or by the Company without cause). If Mr. Kramer voluntarily leaves the Company's employ or if his employment is terminated for cause between September 3, 1978 and May 31, 1985, Mr. Kramer will be obligated to return those bonuses to the Company. As part of the amendment to his employment agreement, Mr. Kramer agreed to terminate his non-qualified stock option, which entitled him until May 31, 1976, to purchase up to 20,000 shares of the Company's Common Stock at a price equal to the sum of $3.625 per share, less the amount, if any, by which the market price of the Common Stock on the last date preceding the date of exercise exceeds $3.625; the purchase price could not have been less than $1 per share.

(5) The Company entered into an employment agreement on October 17, 1975 with George Gleitman for a term expiring on August 31, 1980, at an annual salary of $70,000. In addition, Mr. Gleitman is entitled to a bonus for each fiscal year equal to the greater of (a) $10,000 or (b) the sum of (i) ½ of 1% of the Company's consolidated net income for the fiscal year (before giving effect to this portion of his bonus) plus (ii) a sliding percentage (1% to 2%) of the operating profit of the Retail Division (as determined by the Company) for the fiscal year.

On October 2, 1975, the Company entered into an employment agreement with another officer for a term expiring on September 1, 1977 at an annual salary of $65,000 for fiscal 1976 and $70,000 for fiscal 1977 plus a bonus equal to a sliding percentage (¾ of 1% to 1%) of the Company's consolidated net income (as defined) for the fiscal year.

The employment agreements described above are not subject to shareholder approval.

The Company has a Profit Sharing Plan for Employees which is qualified under the Internal Revenue Code and provides for annual contributions by the Company, at the discretion of the Board of Directors, within prescribed limits based upon compensation of the covered employees. Benefits are payable upon death, retirement, disability or termination (except discharge for cause) from the employ of the Company. The Company contributed $200,000 to the Plan in fiscal 1975.

Outstanding Stock Options

Pursuant to the Company's Stock Option Agreement dated June 13, 1972 with Mr. Kramer, the non-qualified stock option granted to him under that agreement was exercisable as to an additional 10,000 shares only if the pre-tax profits of the Company's Knit Division exceeded a specified amount for any of the fiscal years 1973, 1974 and 1975. This amount was exceeded for fiscal 1975, and on January 12, 1976, Mr. Kramer exercised the option and purchased the 10,000 shares at the option price of $1 per share (an aggregate of $10,000). On August 29, 1975, the last trading day in fiscal 1975, the closing price of the Company's Common Stock on the American Stock Exchange was $3⅜; on January 12, 1976, the closing price was $6⅝ making the aggregate market value on that date of the 10,000 shares purchased by Mr. Kramer $66,250. See Note (4) to "Remuneration of Directors and Officers" above for information on the termination of Mr. Kramer's non-qualified option to purchase up to 20,000 additional shares of the Company's Common Stock.

Since September 2, 1974, the Company has granted qualified stock options to an officer to purchase 5,000 shares of the Company's Common Stock at a price of $1.375 per share.

As of March 31, 1976, Mr. Gleitman held qualified stock options to purchase 5,000 shares of the Company's Common Stock at a price of $2.75 per share, and all officers and directors as a group held qualified options to purchase an aggregate of 10,000 shares at an average price per share of $2.06.

RESTRICTED STOCK AWARD AND RELATED CASH BONUS GRANTED TO DAVID R. CAPLAN

In 1972, as part of the inducement to David R. Caplan to leave his former position and enter the Company's employ, the Company's shareholders approved the grant to Mr. Caplan of a non-qualified option to purchase up to 50,000 shares of the Company's Common Stock at a price equal to $4.875 per share less the amount, if any, by which the market price of the Common Stock on the date the option is exercised exceeds $4.875. Under the terms of the option the Company would have been required to pay to Mr. Caplan, upon exercise of the option, a cash bonus in an amount equal to the amount by which the aggregate market price of the shares of Common Stock acquired on such exercise exceeded the aggregate option price. This option expired according to its terms on June 30, 1975. Since the Company believed that the proposed merger with AFW would be consummated and that the Company would return to private status, the option was not extended nor was a new option granted in connection with the new employment agreement which was entered into with Mr. Caplan in March 1975 upon the expiration of his original employment agreement.

On March 2, 1976, the Board of Directors of the Company, upon the recommendation of its Compensation Committee, unanimously granted to Mr. Caplan, subject to shareholder approval, a new non-qualified option to purchase up to 50,000 shares of the Company's Common Stock at the same price, together with a related cash bonus, substantially on the terms provided in the option that expired on June 30, 1975. Upon further consideration, however, the Board, upon the recommendation of the Compensation Committee, determined that in view of the market price of the Company's Common Stock it appeared likely that Mr. Caplan would exercise the option as to all 50,000 shares immediately upon shareholder approval, and that it would be more in the interest of the Company, and would provide a longer-term incentive to Mr. Caplan, for the Company to give to Mr. Caplan, in lieu of the option, a restricted stock award of 50,000 shares of the Company's Common Stock, with restrictions keyed to his continued employment by the Company. Accordingly, on March 29, 1976, the Board unanimously approved, subject to shareholder approval, a stock award and related cash bonus to Mr. Caplan on the terms described below.

The 50,000 shares will be issued to Mr. Caplan without any cash payment by him as soon as practicable after shareholder approval. Until the lapse of the restrictions described below, the shares will be non-transferable and Mr. Caplan will be obligated to return them to the Company if he voluntarily leaves the Company's employ or if his employment is terminated for cause. These restrictions will lapse as to 20,000 shares on the last day of the Company's fiscal year ending in 1976 and as to an additional 10,000 shares on the last day of each of the Company's fiscal years ending in 1977 through 1979. Mr. Caplan will have unconditional ownership of the shares as to which restrictions have lapsed; if, however, Mr. Caplan's employment is terminated by his permanent disability or death or by the Company without cause, the restrictions will lapse as to all shares then subject to restrictions.

In addition, upon the lapse of the restrictions as to any shares Mr. Caplan will receive a cash bonus equal to the then aggregate market value of such shares. From the date of the initial issuance of the shares, Mr. Caplan will have the right to receive any dividends paid with respect to all 50,000 shares and the right to vote the shares on any matter requiring the approval of the Company's shareholders.

The agreement also provides that if at any time the Company files a registration statement under the Securities Act of 1933, with respect to an offering of common stock by Alvin or Frank Weinstein (or any entity controlled by them), Mr. Caplan will be entitled to have included in that registration statement any of the 50,000 shares as to which the restrictions have then lapsed. Counsel to the Company has advised that absent such registration, under the Securities Act of 1933 and the rules and regulations thereunder, Mr. Caplan will not be able to sell publicly any of the 50,000 shares until two years after restrictions have lapsed on the particular shares in question, and at that time his sales will be subject to the limitations contained in Rule 144 under the Act.

In connection with the grant of the stock award and related cash bonus, the Company's reported income (before taxes) will be reduced by (i) a charge to income of $305,000 in the fiscal year ending in 1976 and a charge to income of $152,500 in each of the fiscal years ending in 1977 through 1979, and (ii) a charge to income in each of the fiscal years ending in 1976 through 1979 equal to the amount of the cash bonus paid to him upon the lapse of a restriction; in each case these charges will be reduced by the applicable income tax effect.

Mr. Caplan has agreed not to make an election under § 83(b) of the Internal Revenue Code with respect to the stock award. The Company has been advised by its counsel that the federal income tax consequences of the stock award and related cash bonus will be as follows. Mr. Caplan will not realize any taxable income upon the issuance of the restricted stock to him, but when restrictions lapse as to any shares he will realize taxable compensation income in an amount equal to the then aggregate market value of those shares. He will also have taxable compensation income in the amount of the cash bonus payable to him with respect to those shares. The taxable compensation income will be earned income annually subject to a maximum marginal federal income tax rate of 50%. His basis for the shares for federal income tax purposes will be the fair market value of the shares on the date restrictions lapse, and any gain or loss on a subsequent sale of the shares will be taxed as capital gain or loss. The Company will be entitled to a deduction for federal income tax purposes in the same amount as the taxable income realized by Mr. Caplan with respect to those shares. It will also be entitled to a deduction for the cash bonus paid to Mr. Caplan, in the same amount.

The net effect of this arrangement will be, substantially, that Mr. Caplan will obtain the shares free of any cost to him. On the basis of a tax rate of approximately 50%, there will be substantially no net cash cost to the Company so long as it has sufficient taxable income to utilize the deduction. The Company's reported income (before taxes), however, will be reduced as described above.

The closing price of the Company's Common Stock on the American Stock Exchange on April 14, 1976 was 12¾.

An affirmative vote by holders of more than 50% of the outstanding shares of Common Stock is required for the approval of the stock award and related cash bonus to Mr. Caplan. Messrs. Alvin and Frank Weinstein have agreed with Mr. Caplan to cause AFW Fabric Corp. to vote the 1,226,549 shares owned by it (68% of the outstanding shares of the Company's Common Stock) in favor of the approval of the stock award and related bonus granted to Mr. Caplan.

RATIFICATION OF THE APPOINTMENT OF INDEPENDENT CERTIFIED PUBLIC ACCOUNTANTS

The Board of Directors of the Company has selected the firm of Eisner & Lubin, independent certified public accountants, to examine the financial statements of the Company for the fiscal year ending August 29, 1976, subject to ratification by the stockholders. Representatives of Eisner & Lubin will attend the meeting, and have an opportunity to make a statement if they wish to do so, and will be available to respond to appropriate questions from stockholders. The Board of Directors of the Company does not have an audit committee.

MISCELLANEOUS

Management does not know of any other matters to be presented at the meeting for action by stockholders. If any other matters requiring a vote of the stockholders arise at the meeting or any adjournment thereof, it is intended that votes will be cast pursuant to the proxies with respect to such matters in accordance with the best judgment of the persons acting under the proxies.

The Company will pay the cost of soliciting proxies in the accompanying form. In addition to solicitation by use of the mails, certain officers and regular employees of the Company may solicit the return of proxies by telephone, telegram or personal interview and may request brokerage houses and custodians, nominees and fiduciaries to forward soliciting material to their principals and the Company will reimburse them for their reasonable out-of-pocket expenses.

ANNUAL REPORT

The Company's Annual Report for the fiscal year ended August 31, 1975 has previously been mailed to the Company's stockholders.

Stockholders are again urged to send in their proxies without delay.

April 19, 1976

APPENDIX B

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February 12, 1976

BY HAND

Honorable J. Joseph Smith
United States Circuit Judge
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York

Re: Marshel v. AFW Fabric Corp., et al.
Swift v. Concord Fabrics Inc., et al.
Docket No. 75-7404

Dear Judge Smith:

There is now pending before Your Honor an appeal by plaintiffs Marshel and Swift from an order denying their motions for a preliminary injunction against the proposed merger of AFW Fabric Corp. into Concord Fabrics Inc.

On February 11, 1976, Concord announced that the proposed merger had been terminated. Accordingly, we believe that the plaintiffs' appeal is now moot and should be dismissed.

Respectfully yours,

Milton Sherman

MS:lb

cc: Honorable Thomas J. Meskill
Honorable Paul R. Hays
United States Circuit Judges

Martin A. Coleman, Esq.
Rubin, Baum, Levin, Constant
& Friedman
Attorneys for plaintiff Arnold Marshel

Burton L. Knapp, Esq.
Lipper, Lowey & Dannenberg
Attorneys for plaintiff Barry Swift

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TEL 637 91 30

February 12, 1976

BY HAND

Honorable Paul R. Hays
United States Circuit Judge
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York

Re: Marshel v. AFW Fabric Corp., et al.
Swift v. Concord Fabrics Inc., et al.
Docket No. 75-7404

Dear Judge Hays:

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cc: Honorable Thomas J. Meskill
Honorable J. Joseph Smith
United States Circuit Judges

Martin A. Coleman, Esq.
Rubin, Baum, Levin, Constant
& Friedman
Attorneys for plaintiff Arnold Marshel

Burton L. Knapp, Esq.
Lipper, Lowey & Dannenberg
Attorneys for plaintiff Barry Swift

APPENDIX B

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February 12, 1976

BY HAND

Honorable Thomas J. Meskill
United States Circuit Judge
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York

Re: Marshel v. AFW Fabric Corp., et al.
Swift v. Concord Fabrics Inc., et al.
Docket No. 75-7404

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United States Circuit Judges

Martin A. Coleman, Esq.
Rubin, Baum, Levin, Constant
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Attorneys for plaintiff Arnold Marshel

Burton L. Knapp, Esq.
Lipper, Lowey & Dannenberg
Attorneys for plaintiff Barry Swift

APPENDIX B

February 13, 1976

Honorable Thomas J. Meskill
United States Circuit Judge
United States Court of Appeals
for the Second Circuit
c/o U.S. Post Office Building
West Main Street
New Britain, Connecticut 06050

Re: Marshel v. AFW Fabric Corp,, et al.
Swift v. Concord Fabrics Inc., et al.
Docket No. 75-7404

Dear Judge Meskill:

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cc: Honorable Paul R. Hays
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United States Circuit Judges

Martin A. Coleman, Esq.
Rubin, Baum, Levin, Constant
& Friedman
Attorneys for plaintiff Arnold Marshel

Burton L. Knapp, Esq.
Lipper, Lowey & Dannenberg
Attorneys for plaintiff Barry Swift

APPENDIX C

At a Special Term, Part II, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, Pearl and Centre Streets, Borough of Manhattan, State of New York, on the day of March 9th, 1976.

P R E S E N T :

Hon. XAVIER C. RICCOBONO

Justice.

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

-against-

CONCORD FABRICS, INC., AFW FABRIC CORP., ALVIN WEINSTEIN, FRANK WEINSTEIN and DAVID R. CAPLAN,

Defendants.

FINAL JUDGMENT

Index No. 40678/75

The plaintiff brought this action pursuant to section 353 of the General Business Law of this State by the service of a summons and complaint upon the above named defendants seeking a judgment permanently enjoining and restraining said defendants from consummating a proposed merger of Concord Fabrics Inc. ("Concord") and AFW Fabric Corp. ("AFW"), the terms of which merger are set forth in a Notice of Special

Meeting of Shareholders of Concord dated March 17, 1975 and the accompanying Proxy Statement, as well as from violating the provisions of Article 23-A of the General Business Law of this State.

NOW, on reading and filing the summons dated April 4, 1975; the complaint verified on April 4, 1975; the affidavit of Eugene D. Berman, Deputy Assistant Attorney General, sworn to April 4, 1975; the affidavit of Sidney J. Silberman, sworn to April 15, 1975; and the consents of the defendants in which they specifically deny each and every allegation of the complaint herein and the aforementioned affidavit of Eugene D. Berman, and due deliberation having been had,

On motion of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for plaintiff, it is

ORDERED, ADJUDGED AND DECREED that the defendants be permanently enjoined, barred and restrained from directly or indirectly effectuating the proposed merger of Concord and AFW, the terms of which merger are set forth in a Notice of Special Meeting of Shareholders of Concord dated March 17, 1975 and the accompanying Proxy Statement, and from any act in aid or furtherance of the merger; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants be permanently enjoined, barred and restrained from directly or indirectly engaging in any fraudulent practice as defined in

section 352(1) of the General Business Law of this State, in connection with any tender offer or merger or other transaction for the purpose of returning Concord to the private ownership of the individual defendants Alvin and Frank Weinstein or members of their families; and it is further

ORDERED, ADJUDGED AND DECREED that the Attorney General of the State of New York may make such further application under the provisions of this judgment and decree as plaintiff may be advised is proper and necessary for the enforcement of this judgment and decree, all pursuant to Article 23-A of the General Business Law of this State and other provisions of law applicable thereto; and it is further

ORDERED, ADJUDGED AND DECREED that costs be awarded to plaintiff pursuant to section 8303(a)(6) of the Civil Practice Law and Rules in the total amount of Six Thousand Five Hundred Dollars ($6,500.00), consisting of Two Thousand Dollars ($2,000.00) in respect of AFW, Two Thousand Dollars ($2,000.00) in respect of Alvin Weinstein, Two Thousand Dollars ($2,000.00) in respect of Frank Weinstein and Five Hundred Dollars ($500.00) in respect of David R. Caplan.

E N T E R

J. S. C.

Filed
MAR 10, 1976
New York
Co. Clerk's OFFICE

S/ NORMAN GOODMAN
Clerk

COPY RECEIVED
2 copies

[illegible] FRIEDMAN

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Date 2/22/77 3:15 PM

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

Attorney(s) for

[illegible]

2 Copies Received

Date: 2/22/77

Lipper, Lowey & Dannenberg

attorneys for plaintiff [illegible]